No. 90-1937

Supreme Court, U.S.
FILED
AUG 23 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM F. PATY.,

Petitioner,

v.

MERVIN NAPEAHI

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE*, THE HOU HAWAIIANS, MAUI LOA AND KAMUELA PRICE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

INTEREST OF AMICI

THE HOU HAWAIIANS is a native Hawaiian *Ohana* (tribal or extended family group), which has been advocating the interests of native Hawaiian applicants for Hawaiian homestead lands and entitlements under section 5(f) of the Hawaii Admissions Act, before courts, legislatures and administrative agencies, since 1975. The Hou Hawaiians was founded in that year, by its Chief, MAUI LOA, born Doctor Nui Loa Price. He is a well known ethnic artist and craftsman who spends much of his time advocating justice for the native Hawaiian people. MAUI LOA is a native Hawaiian of 50 percent aboriginal blood, and has been a registered applicant with the Hawaii State

Department of Hawaiian Home Lands (DHHL) for a Hawaiian homestead allotment, since 1974.

KAMUELA PRICE, is not a native Hawaiian, but he is MAUI LOA's father and is a member of the Elder Counsel of THE HOU HAWAIIANS. Mr. Price is similarly devoted to the advancement of the interests of native Hawaiians.

Amici are responsible for the establishment of the Federal-State Task Force on the Hawaiian Homes Commission Act, in 1983, as part of the settlement of *Price v. Department of Justice*, C.A. No. 80-2794 (D.D.C.), in the United States District Court for the District of Columbia. KAMUELA PRICE was appointed by then Gov. George Ariyoshi, as a member of the Task Force. Through the efforts of the Task Force some 30,000 acres of homelands which had been appropriated for other uses by the State were returned to the jurisdiction of DHHL. As the further result of the work of the task force some 1500 native Hawaiians received awards of homesteads, and DHHL announced that its waiting list had been brought current. However, MAUI LOA, himself, has not yet received an allotment.

Amici have appealed to the U.S Court of Appeals from dismissal of four suits filed in the United States District Court for the District of Hawaii against the State of Hawaii or various state officers to enforce the rights of native Hawaiians conferred by Congress in § 5(f) of the Hawaii Admissions Act. These cases are: *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. den. sub nom. The Hou Hawaiians v. Hawaii*, 475 U.S. 1091 (1986); *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990), *cert. pending sub nom. Akaka v. Price*, (U.S. No. 90-1941); *Price v. State of Hawaii*

(hereafter called *Price v. Paty*), 921 F.2d. 950 (9th Cir. 1990); and *Price v. State of Hawaii*, slip op. C.A. No. 90-15117 and 90-15863 (9th Cir. July 11, 1991) (amended on denial of motions for rehearing Aug. 8, 1991) (hereafter *Price v. Sailors' Home Society*). The issues of standing and Eleventh Amendment immunity were raised by the defendants in each and every one of these cases.

SUMMARY OF THE ARGUMENT

This case is not a proper case in which to decide the issues raised by Petitioner in the Questions Presented for Review, because the issues were not sufficiently raised below. If the issues raised in the petition are important enough to warrant certiorari, it should be granted in the case of *Price v. Sailors Home Society*, C.A. No. 90-15117 and 90-15863, decided by the Court of Appeals on August 8, 1991.

ARGUMENT

Distilled down to their essence, the questions presented for review are: 1) Whether a native Hawaiian has standing to bring suit to enforce § 5(f) of the Hawaii Admissions Act? and 2) Whether state officers are protected from such suit by the Eleventh Amendment? As appears from the opinion of the Court of Appeals, neither of these issues was raised below.

The Court of Appeals opinion does not discuss the Eleventh Amendment issue. The Appendix to the Petition indicates that the issue was raised in the Memorandum in support of Defendants' motion to dismiss the First Amended Complaint. Pet. App., pp. 76a-80a. However, this point was raised in connection

with Plaintiffs' prayer for monetary damages. Pet. App. p. 77a.

The First Amended Complaint was further amended to drop all claims for damages, and the Eleventh Amendment issue does not appear to have been raised thereafter.

The issue of standing was clearly not raised by petitioner in the court below. The Court of Appeals so observed, and then raised the issue *sua sponte*, because it is jurisdictional under Article III of the U.S. Constitution. The Court of Appeals, in footnote 2, stated:

> "Although the parties have not, in this case, raised the issue of standing to enforce the provisions of the Trust, Napeahi, as a native Hawaiian and beneficiary of this public trust, does have standing to enforce its provisions. *See Price v. Akaka*, No. 89-15169, slip. op. at 11822-23 & n.2 (9th Cir. September 25, 1990)." App. p. 7a.

On the other hand, the issues of standing and Eleventh Amendment immunity have been raised and discussed by the Court of Appeals in each of the cases brought by *amici*. In *Price v. State of Hawaii*, *amici* brought suit seeking a ruling that a portion of the § 5(f) revenues be used to provide infrastructure for Hawaiian homelands to facilitate awards of homestead grants. Jurisdiction of the federal district court was predicated on 28 U.S.C § 1362. The district court dismissed the action, and the Court of Appeals affirmed, holding that § 1362 does not confer jurisdiction, because the Hou are not an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior."

Nevertheless, the court ruled that a native Hawaiian does have standing to bring suit against state officials for prospective injunctive relief and that such officials are not protected by the Eleventh Amendment. *Price v. State of Hawaii, supra*, 764 F.2d at 629-30.

In *Price v. Akaka, amici* sued the trustees of the Office of Hawaiian Affairs for allegedly using proceeds of the § 5(f) trust to benefit Hawaiians as distinguished from *native* Hawaiians.[1] The district court dismissed the action. On appeal, the Court of Appeals reversed, holding that native Hawaiians have standing to sue state officers individually for damages and that the officers are not protected from such suit by the Eleventh Amendment. *Price v. Akaka, supra*, 928 F.2d at 826-8.

In *Price v. Paty, amici* brought suit against the Chairman and members of the Board of Land and Natural Resources of the State of Hawaii for an accounting of assets and income from the trust. The district court granted summary judgment against plaintiffs, and the Court of Appeals affirmed. The Court of Appeals held that defendants are not accountable as ordinary trustees, because § 5(f) does not require the high standard of fiduciary duty often imposed by courts on trustees of native Americans. *Price v. Paty, supra*, 921 F.2d at 955. Nevertheless,

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[1] One of the purposes of the § 5(f) trust is the betterment of the condition of "*native* Hawaiians", defined in the Hawaiian Homes Commission Act, as persons of 50 percent or more aboriginal blood. "Hawaiians" are persons of *any* amount of aboriginal blood.

the Court of Appeals again rejected the perennial Eleventh Amendment immunity argument advanced by defendants, as follows:

> "This determination offers no succor to the state officials. The suit against present officials seeks prospective relief, which is proper. *See Keaukaha II*, 739 F.2d at 1472. To the extent that damages are sought against former officials, the State is not implicated. *See Price v. Akaka*, 915 F.2d at 473." *Id.* at p. 958.

Price v. Sailors' Home Society is, is a suit, similar to the instant case, seeking recovery of land that is allegedly part of the § 5(f) corpus. *Amici* brought suit to recover land conveyed by the Hawaiian government to a charitable organization by deed defeasible on the condition that the property is used for purposes other than as a sailors' home. The complaint alleges that the property is no longer being used as a sailors' home and under the reversionary clause is now part of the § 5(f) trust. The district court dismissed the complaint for failure to state a claim. The Court of Appeals went beyond the pleadings to make factual findings not made by the district court that the private grantee had obtained judicial approval of a redevelopment project on the subject property. Based on that factual assumption, the Court of Appeals affirmed in part and reversed in part. The Court ruled that the complaint did not state a claim against the private parties, but did against the state officials.

The defendants once again raised the issues of standing and Eleventh Amendment immunity. The Court of Appeals disposed of the standing argument as follows:

> "At the outset, we are met by the State's assertion that appellants lack standing. This issue can be quickly disposed of. We have previously made it clear that persons in the position of these appellants do have standing to challenge the use of section 5(f) lands. *See Akaka*, 928 F.2d at 826-27; *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990); *Price I*, 764 F.2d at 630. As we have said, although section 5(f) itself does not provide a private right of action, an action under 42 U.S.C. § 1983 is proper. *Ulaleo*, 902 f.2d at 1397; *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n.*, 739 F.2d 1467, 1470-71 (9th Cir. 1982) (Keaukaha II)." *Price v. Sailors' Home Society, supra*, slip op. at 10667.

The Court also made it clear that the Eleventh Amendment only precludes suits against the State for damages and does not preclude a suit against state officers in their official capacities for prospective injunctive relief or against them in their individual capacities for damages. *Id.*, at pp. 10667-9.

The Petitioner herein was not a party to *Price v. State of Hawaii* or *Price v. Akaka*. However, Petitioner is being sued herein only in his official capacity as Director of the Department of Land and Natural Resources.[2] Petitioner herein is represented

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[2] Petitioner is not named as a party in the complaint, first amended complaint or second amended complaint. Petitioner appears here only as successor to Susumo Ono, former Director of the Department of Land and Natural Resources.

by the Attorney General of the State of Hawaii, as were all of the state officers sued in all four of the cases brought by *amici*. None of the defendants in any of the cases mentioned above sought review by this Court of the adverse decisions therein on the issues of standing or Eleventh Amendment immunity.

The defendants in *Price v. Akaka* have petitioned this Court for a writ of certiorari. However, they did not raise the issues of standing or Eleventh Amendment immunity in the questions presented for review, even though they vigorously asserted those defenses in the courts below.

Amici question why Petitioner seeks review by this Court of issues not raised in the courts below, while passing up the opportunity to do so in other cases where the issues are raised, litigated and discussed by the Court of Appeals.

Petitioners suspect that the history of litigation in the case of *Trustees of the Office of Hawaiian Affairs v. Yamasaki* 69 Haw. 154, 737 P.2d 446, *cert. den.* 484 U.S. 898 (1987), may suggest an answer to this question. The history of the *Yamasaki* lawsuit was recently recounted in the June, 1991 issue of *Ka Wai Ola O OHA*, the official newspaper published by the Office of Hawaiian Affairs. That article is reprinted in the Appendix to this Brief.

According to OHA, the *Yamasaki* (Department of Transportation) suit was filed, in 1984, by OHA as a "friendly" suit at the suggestion of former Gov. George Ariyoshi. App., p. 3a. After the suit was filed,

> "Powerful state House Speaker and part-Hawaiian Henry Peters met with seven trustees and urged them to withdraw the suit. Governor

Ariyoshi publicly warned that the suit would adversely affect the state's revenue bonds." App., p. 4a.

* * *

"After years of stalling and delay, the Moloka'i and DOT cases (which had been consolidated into one suit) made their way to the U.S. Supreme Court, which on October 13, 1987, refused to hear OHA's claim against the State.

"The high court was saying, in effect, that the state legislature should clarify itself.

"The matter was destined to be decided politically, by negotiation with the new and more sympathetic administration of Governor John Waihee, who had been instrumental in the creation of OHA at the 1978 Constitutional Convention. These negotiations led to the historic ceded lands settlement between OHA and the state in 1990." App., p. 5a-6a.

Petitioner now cites the *Yamasaki* case for the proposition that native Hawaiians have no particular entitlement to § 5(f) funds. Pet. at 19-20. Petitioner describes the 1990 settlement between OHA and the state as follows:

"Likewise, the 1990 amendments reaffirm OHA's discretion to create programs with 5(f) revenue that rationally exclude various groups of its native Hawaiian beneficiaries from government benefits, and thereby to deny completely to certain native Hawaiians benefits flowing from the 5(f) trust corpus. (Similar discretion is likewise retained by Petitioner with respect to 5(f) proceeds not subject to the OHA trust, i.e., Haw.

Rev. Stat. § 171-18.)" Pet., p. 20, fn. 4.

Thus, while *amici* were litigating in federal courts to establish the right of the native Hawaiian to bring suit to enforce § 5(f) of the Hawaii Admissions Act, OHA was engaged in "friendly" litigation in the state courts resulting in a decision that the rights of native Hawaiians are a matter to be left to the discretion of the state legislature. Indeed, the trustees of OHA actually espoused the argument in *Price v. Akaka*, that native Hawaiians do not have standing to sue to enforce the § 5(f) trust.

Rather than spend trust money to provide homes and otherwise better the condition of native Hawaiians, OHA is now dedicating its efforts toward establishment of a new sovereign Hawaiian nation. OHA has accepted the purported "right" to exclude certain groups of native Hawaiians from § 5(f) benefits as a means of punishing groups like the Hou Hawaiians who dare to challenge their leadership and authority over this proposed new Hawaiian nation. [3]

Based on this historical background, *Amici* do not trust OHA to protect their rights, unless their right to sue is protected. While *amici* do not, in the slightest, doubt the integrity of the individual attorneys for Respondent, their fear of OHA is not assuaged by the fact that the Native Hawaiian Legal Corp., representing Respondent herein, receives a major

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[3] OHA's lack of concern for the plight of native Hawaiians results from their election by Hawaiians, rather than *native* Hawaiians. There are hundreds of thousands who claim to be Hawaiian, but only a few thousand surviving *native* Hawaiians.

portion of its funding from OHA. *Amici* fear the possibility of improper influence by OHA over Respondent's counsel. If Respondent loses in this case, the OHA trustees will win in *Price v. Akaka*.

But more importantly, Respondent in this case simply does not have the extensive experience in litigating the issues of standing and Eleventh Amendment immunity that *Amici* have. For example, *Amici* realize that the linchpin of Petitioner's argument against standing is the claim that the state has the "right" to exclude certain groups of native Hawaiians from § 5(f) benefits. OHA agrees with this point. If Petitioner is unable to prevail on this point, his argument against standing will evaporate.

Amici do not concede this point. The argument is based on the language "one or more of the foregoing purposes" in § 5(f). Petitioner argues that this justifies the use of the entire trust corpus for purposes other than the betterment of the condition of native Hawaiians. Amici would argue on the merits that the historical treatment of native Hawaiians and legislative history of the Hawaii Admissions Act demonstrate clearly that Congress intended that the § 5(f) trust *would* be used to better the conditions of native Hawaiians and that all native Hawaiians would share in the benefits of the Trust.

Part of the § 5(f) Trust corpus is the "available lands" set aside in the Hawaiian Homes Commission Act for Hawaiian homesteads. Every native Hawaiian desiring one, is entitled to a homestead award. The state has used the lack of infrastructure as an excuse for not providing homesteads to *Amici* and others. But the § 5(f) income was intended to be used to provide that infrastructure.

Under the law, every *native* Hawaiian is entitled, at least, to a decent home. In fact, however, native Hawaiians presently make up a large portion of the homeless population in his native land.

Congress has amply provided for the welfare of the few surviving native Hawaiians. Petitioner herein and the other state officials, including the trustees of OHA, are using plight of the *native* Hawaiian as a means of establishing a new sovereign Hawaiian nation, comprising several hundred thousand citizens or more.

This is not in the best interests of the United States. *Amici* would argue that the problem of the native Hawaiian can easily be solved by using a small portion of the resources provided by Congress.[4] Congress limited the benefits to those of 50 percent or more aboriginal blood to preserve the Hawaiian race. Encouraging the dilution of the race will eventually result in its extinction.

It is in the best interest of the United States and the native Hawaiian to enforce existing the Trust provisions for native Hawaiians. This simply will not be done unless native Hawaiians have the right to enforce their rights in the courts of the United States.

Amici believe that the issues of standing and immunity have been properly decided by the Court of Appeals. Therefore, *Amici* wish to preserve any and

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[4] The state receives $200 million annual rent from only one tenant at Honolulu International Airport. Two thirds of the airport is on Trust land. One-fifth of two-thirds of $200 million, is more than enough money to provide a decent home for each and every homeless native Hawaiian.

all objections to granting certiorari on these issues. However, if the Court deems these issues important enough to warrant certiorari, this case is not the proper vehicle for review. Petitioner is a defendant in *Price v. Sailors' Home Society* and the time for filing a petition for certiorari has not yet expired. The issues presented here have been raised and litigated in that case. Review should be made in a case where the issues were raised below.

CONCLUSION

For the foregoing important reasons, *Amici* respectfully request this Court to deny the Petition for Writ of Certiorari to the Ninth Circuit Court.

Dated: Honolulu, Hawaii, August 23, 1991.

Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)

Kamuela Price

The following is a reprint of an article appearing in the June, 1990 issue of *Ka Wai Ola O OHA*:

OHA vs. State of Hawai'i

On April 9, 1983, the Board of Trustees of the Office of Hawaiian Affairs authorized well-known attorney Boyce Brown to proceed with a lawsuit against the State of Hawai'i. The suit sought to retrieve OHA's 20 percent share of a $1.8 million settlement reached between the state and Moloka'i Ranch Inc. regarding illegal sand mining done by the ranch on public trust, or "ceded" lands at Kaluakoi, Moloka'i.

The technicalities of the suit were complex, but its historic importance cannot be overestimated. For the first time in its brief existence, OHA was not going to be polite. In fact, OHA would go all the way and *demand* its rightful and legal share of *all* public land trust revenues.

But OHA was already receiving about $1.2 million every year from the public land trust revenues, at least from those revenues collected by the Department of Land and Natural Resources. Wasn't that enough?

"No, it wasn't enough," says former Trustee Rod Burgess who, as chairman of OHA's land committee during those crucial years, led the charge for full payments from the public land trust. "We were going after our 20 percent of revenues from our lands, Hawaiian lands, and it wasn't up to the discretion of the state what OHA would get paid--the law was specific. We were going after what we were entitled

to."

As the trustees and their advisors became more knowledgeable about the public, or "ceded" land trust, became aware that they were being short-changed by the state. This was at about the same time that they realized that the monies they *were* getting from the trust, between $1.2 and $1.5 million annually, was barely enough to staff the office and pay overhead, much less service the needs of the Hawaiian community.

According to Trustee Moses Keale, "The Molokai sand-mining suit happened at a time when we were dickering with the state about what revenues from which lands OHA should get. The law said we get 29 percent from all income, period, but the department chiefs within the Ariyoshi administration had different ideas. So we had this jockeying back and forth."

Summarizing the Board's reasoning for the suit, constitutional lawyer Jon Van Dyke, a professor at the HU Law School and a long-time adviser to OHA, says "There was a lot of frustration, a feeling that the state was not responsive to OHA's concerns and claims, a sense the administration was nickel-and-dimeing OHA constantly."

The Department of Transportation (DOT), for example, wasn't sharing any of its revenue (estimated at $100 million annually) with OHA, even though the income-producing Honolulu International Airport and harbors throughout the state were on ceded land. The Department of Land and natural Resources (DLNR), which was providing all of OHA's ceded lands income, mostly from agricultural lease rents, had no way to ensure a full accounting for its quarterly payments to OHA, payments which fluctuated with every quarter,

depending on payments DLNR's tenants were--ore were not--making.

The Moloka'i sand mining suit, spearheaded by Trustees Walter Ritte, Rod Burgess and Hayden Burgess and endorsed unanimously by the Board was the first effort to raise this complex but vital issue of fairness and legal entitlement in the courts.

OHA's claims against the state made the newspaper headlines. To judge by the reaction, from commentators and editorial writers, you'd have thought that OHA (whose mandate was to help all Hawaiians, and whose annual budget would barely cover the purchase of a single home in Kohala) was being ungrateful.

Requests for a meeting with then-Governor Ariyoshi went unanswered. A meeting between Ariyoshi's DOT director, Ryokichi "Ricky" Higashionna, and a delegation from OHA ended quickly and nastily when Higashionna promised the delegation that OHA wasn't getting a penny from DOT and then threw them out of his office.

Finally, a few OHA trustees met with the governor in early 1984. He backed his appointed department heads, refusing to make any concessions. Instead, Hawaii's chief executive suggested OHA initiate a second, "friendly" lawsuit against the State of Hawaii, a suit that would settle the whole question of public trust lands revenues once and for all.

"The governor's suggestion was totally surprising and shocking,' Burgess says. "He had the discretionary authority to resolve the situation without a suit, but he went for the suit because he probably knew the financial impact of a negotiated settlement with OHA would have been significant. His concerns

were strictly political; he had a hot potato on his hands and rather than make the decision himself he passed the buck to the judiciary.

"This was the same governor," Burgess says, "who had promised us an 'open door policy' and here he was, on the first big issue we raised, and his policy becomes a closed-door policy. The suit was the only avenue he gave us."

Analyzing the situation from the perspective of seven years later, Trustee Keale says, "Nobody, including the governor, was ready to commit to OHA politically. They were hoping we would just fade away."

The trustees went back to their offices and did exactly what Ariyoshi suggested. They hired a second high-profile attorney, David Schutter, to join Boyce BROWN IN A SECOND LAWSUIT to claim one-fifth of the revenues from all DOT lands and from lands under the proposed Aloha Tower redevelopment and land leased to Matson Navigation Company on Sand Island in Honolulu Harbor. The stakes were high: OHA's projected 20 percent share of annual revenues from these lands was estimated at somewhere between $10 and $20 million.

The newspaper headlines announcing the second suit on march 9, 1984 were even bigger this time.

Very quickly a lot happened. Powerful state House Speaker and part-Hawaiian Henry Peters met with seven trustees and urged them to withdraw the suit. Governor Ariyoshi publicly warned that the suit would adversely affect the state's revenue bonds. A month later, Circuit Court Judge Edwin Honda heard arguments for a summary judgement as to whether OHA had legal standing to sue the state. (A year

later, after several delays, Honda allowed the suit to proceed.)

In the most shocking development to come out of the lawsuit, Deputy Attorney General James Dannenberg suggested that OHA was not in a position to sue because its trustees were elected by one racial group, which was unconstitutional under the equal protection clause. Dannenberg was, in fact, challenging OHA's very existence in the process of arguing the state administration's case.

Jon Van Dyke remains mystified by Dannenberg's suggestion that OHA was unconstitutional, especially after the Attorney General's office had already issued an opinion confirming OHA's legality in 1982. Van Dyke figures the challenge, as confused as it was, was "tactical, in the sense of trying to throw an obstacle in the litigation and scare the trustees; to say, in effect, 'Look, you guys are getting uppity, and if you pursue this line of reasoning, we're going to argue that you don't even exist."

in a March 8, 1984 statement released to the press at the time of the lawsuit, the trustees said, "The suit has been filed with great reluctance and only after two and one-half years of attempts to negotiate a fair and reasonable settlement with the state administration. Because the Department of Transportation refuses even to discuss our entitlements, we are left no option other than to seek justice in the courts.

"The Board of Trustees literally has no discretion in this matter. To ignore the DOT's adamant refusal to comply with the law would be a breach of fiduciary duty which could subject us to a suit by any of our beneficiaries."

After years of stalling and delay, the Moloka'i and

DOT cases (which had been consolidated into one suit) made their way to the U.S. Supreme Court which, on October 18, 1987, refused to hear OHA's claim against the state.

The high court was saying, in effect, that the state legislature should clarify itself.

The matter was destined to be decided politically, by negotiation with the new and more sympathetic administration of Governor John Waihee, who had been instrumental in the creation of OHA at the 1978 Constitutional Convention. These negotiations led to the historic ceded lands settlement between OHA and the state in 1990.

This chapter in OHA's history was a long and difficult one, seven years of legal maneuvering and acrimonious debate, both inside OHA and among the Hawaiian community, and in the state at large. There were those who urged OHA to be patient and those who thought law suits violated the principle of ho'oponopono. There were those who thought suing the State of Hawaii was "treason." To the general public, the endless headlines and courtroom clashes probably looked like so much wasteful, legalistic wheel-spinning, very far from the dream of a Hawaiian political entity leading Hawaiians in the creation of a better-and independent--community.

If the trustees had done nothing and meekly accepted whatever was offered, OHA might have been more "popular" with Hawaii's established power structure, but by the same token it would have become an ineffectual and dependent political tool, destined to pay lip service to the needs of the Hawaiian community with no resources to meet the challenges and goals that had been so optimistically charted in 1978. Through

this battle, as exhausting as it was, the Office matured as an advocate for Hawaiian entitlements and proved that it must be taken seriously.